

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

ROBERT M. HAMILTON,  
Appellant,

v.

UNITED STATES POSTAL SERVICE,  
Agency.

DOCKET NUMBER  
SL0752930063-I-1

DATE: AUG 13 1993

Robert M. Hamilton, Lawrenceburg, Indiana, pro se.

Richard L. Acker, Cincinnati, Ohio, for the agency.

BEFORE

Ben L. Erdreich, Chairman  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the April 26, 1993 initial decision that affirmed the agency's action reducing him in grade and pay. For the reasons discussed below, the Board GRANTS the appellant's petition for review under 5 C.F.R. § 1201.115, REVERSES the initial decision, and finds the agency's action NOT SUSTAINED.

### BACKGROUND

The appellant filed with the Board's St. Louis Regional Office a timely appeal from the agency's October 31, 1992 action reducing him in grade and pay (demoting him) from his EAS-15, Level 6, Supervisor of Mails and Delivery position at \$36,095 per annum plus \$3,141 cost of living allowance (COLA), to a PS-05, Level 0, PTF Letter Carrier position at \$30,106 per annum plus \$2,995 COLA. See Appeal File (AF), Tab 1 and Tab 3, Subtabs 4a-4d, 4g. In his defense, the appellant contended, inter alia, that the agency committed harmful error in effecting his demotion because the deciding official signed the final agency demotion decision on October 6, 1992, after her retirement on October 2, 1992. AF, Tab 1.

After a hearing on the merits of the appeal, the administrative judge affirmed the agency's action, finding, inter alia, that: The agency's action was supported by preponderant evidence; the appellant did not show that he was harmed because the deciding official signed the final decision after her retirement; the action promoted the efficiency of the service; and the appellant's demotion was reasonable. See Initial Decision at 2-31.

In his petition for review, the appellant, inter alia, reiterates his contention of harmful error with respect to the deciding official's signing of the final decision subsequent to her retirement.

### ANALYSIS

The agency's demotion action may not be sustained because it is not in accordance with law.

An agency action that is not in accordance with law may not be sustained. See 5 U.S.C. § 7701(c)(2)(C); *Clark v. U.S. Postal Service*, 52 M.S.P.R. 634, 639 (1992). An appealable action is unlawful in its entirety if there is no legal authority for it, and the Board will reverse it as "not in accordance with law," even if minimum constitutional due process was afforded to the appellant and he has not shown harmful error, i.e., that the alleged error prejudiced his rights so that the outcome before the agency was possibly affected. See *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 683-84 (1991), citing, inter alia, *Handy v. U.S. Postal Service*, 754 F.2d 335, 337-38 (Fed. Cir. 1985), and *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 120 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984); see also *Clark*, 52 M.S.P.R. at 640.

In this appeal, we find that the agency's demotion action is illegal in its entirety because, at the time the deciding official issued the final decision demoting the appellant, she was no longer an agency employee and had no legal authority to demote him. Under 5 U.S.C. § 7513, it is the "agency" that is authorized to take an adverse action against an employee subject to prescribed procedures. See also 5 C.F.R. § 752.404(a)-(h). Under 5 C.F.R. § 752.404(c)(2), "[t]he agency shall designate an official to hear the employee's oral

answer who has authority either to make or recommend a final decision on the proposed adverse action." There is nothing in the applicable statute or regulations that authorizes the agency to designate an individual other than an agency official to make or recommend a final decision on a proposed adverse action or that confers such decision-making authority to taking an adverse action against upon such an individual. Here, the deciding official retired from the agency on October 2, 1992, but she signed the demotion decision letter on October 6, 1992, 4 days after she retired. See Initial Decision at 25. While, in the present case, it is undisputed that the deciding official had the authority to issue the final decision while she was employed with the agency, she had no authority to do so after she was no longer an agency employee. Further, there is no indication in this appeal that the agency duly designated another agency official to ratify her ultra vires decision. Therefore, we find that the deciding official's action was unlawful in its entirety and must be reversed. See *Stephen*, 47 M.S.P.R. at 683-84; see also *Clark*, 52 M.S.P.R. at 640.

#### ORDER

We ORDER the agency to cancel the appellant's demotion and to restore him effective October 31, 1992. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

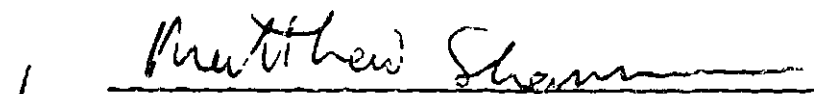
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.